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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

MURRAY SHAPIRO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE RESPONDENT, THE PEOPLE OF THE STATE OF NEW YORK, IN OPPOSITION.

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Opinions Below.

The Appellate Division of the Supreme Court, Second Judicial Department, in unanimously affirming the judgment of conviction, wrote a memorandum opinion (260 App. Div. 930) which is set forth in the Appendix, *infra*, page 17.

The Court of Appeals, in unanimously affirming the judgment of the Appellate Division, wrote a memorandum opinion (285 N. Y.—Weekly Advance Sheets, April 5, 1941), which is set forth in the Appendix, *infra*, page 17.

Jurisdiction.

The judgment of the Appellate Division was entered on November 4, 1940. The judgment of the Court of Appeals was entered on February 27, 1941. The petition for the writ of certiorari was filed on April 26, 1941. The jurisdiction of the court is invoked under the United States Code, Title 28, Sections 344, 347; 43 Stat. 937, 938.

Question Presented.

Whether the introduction in evidence of confessions of two co-defendants, in and of itself, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

The Statutory Provisions Involved.

The applicable statutory definitions of the crimes are set forth in the Appendix, *infra*, pages 18 and 19.

Statement.

The facts, as disclosed by the record, may be summarized as follows:

Charles Schacht and Bessie Schacht, husband and wife, lived at 190 South Eighth Street, Brooklyn (306). On or about October 19, 1938, Charles Schacht telephoned Lester Derene, an insurance broker, to ask him about forms of insurance to protect jewelry. Derene mentioned a floater policy which covers a specific item (160), and explained that an appraisal of the jewelry would be necessary before the policy of insurance would be issued (162).

During October, 1938, Schacht had Louis Snyder, a diamond merchant (219), appraise a combination of brooch

and pendant (224, 226), and a five carat diamond in a lady's setting (230). The appraisal (*People's Exhibit No. 10*) was made out in the name of Bessie Schacht (wife of Charles Schacht) and was delivered to Derene, the insurance broker, who sent it to the Aetna Insurance Company. The policy was issued by the Automobile Insurance Company, a subsidiary of the Aetna Insurance Company (164), and insured Mrs. Schacht against the loss of the brooch, insured for $520, and the diamond, insured for $1250 (177). The policy and the bill for the premium were mailed by Derene to Mrs. Schacht (165). Schacht paid the premium of $37.50 (166, 217).

Schacht telephoned Derene (early in January, 1939), and reported that the jewelry which had been insured was lost on January 4, 1939 (18). He told Derene to notify the insurance company of the loss, which was done (182).

On February 4, 1939, Derene, the insurance broker, met Mr. and Mrs. Schacht in a restaurant on John Street (189), and Mrs. Schacht signed the proof of loss (195). The appellant, whom Derene had known for eight or nine years, was seated at the next table but did not enter into the conversation (192, 196).

The Alleged Burglary.

On January 4, 1939, at 2:30 P. M. (306-307), Mrs. Schacht told Detective Hayden, she had left her apartment at about 12:30 P. M., that day, to take her son to school and that when she returned at about 1:45 P. M., she found that the door had been broken open (310). Some of the linens and clothing that had been in drawers were on the floor and bed (314). Mrs. Schacht reported that cash had been taken as well as jewelry, including an engagement ring and a brooch which were insured (316-318; 320). Schacht explained that he had purchased the ring in 1928 and the brooch in 1933 ("about six years ago") from jew-

elry salesmen whom he had not seen since making the purchases (319-320). The detective declined to take a ten dollar bill which Mr. Schacht offered as he said: "Here take this and do what you can for me." Detective Hayden returned to the Schacht apartment with Detective Bradley at 4 P. M., the same day (321), and made further investigation. He asked Mrs. Schacht to draw a diagram description of the brooch and ring. After she started, she said (337): "I am not good at drawing."

On January 16, 1939, Owen T. Hughes, an adjuster of the insurance company, questioned Mrs. Schacht, who was alone at the time (349). She told him about having left the apartment at 12:30 P. M., on January 4, 1939, to take her son to school and that she did some shopping and visiting, although she could not remember whom she had visited (349-350). She told him about finding the door open and the apartment ransacked when she returned (351). When asked about the missing jewelry, Mrs. Schacht said she was not greatly acquainted with it and that Schacht could tell more about it than she could (352). Schacht, upon arriving, informed Hughes that the ring which was stolen had been purchased in 1928 for $1450, from a jeweler named Julius Harber of 15 West Forty-seventh Street, whose place of business was now located at 71 Nassau Street (354). The brooch, according to Schacht, had been purchased, in 1921, for $750 from a Mr. Satz of the Jeweler's Exchange, Bowery and Canal Street (356). Both of these articles had been appraised by Louis Snyder in October, 1938 (357).

At 10:30 A. M., on January 4, 1939, Gerald T. Donohue and Albert L. Weitsman, special agents of the National Board of Fire Underwriters, went to 190 South Eighth Street, Brooklyn, and observed Bessie Schacht and the appellant leave the building at 12:40 P. M. (825-827; 978). They proceeded to Marcy Avenue and Broadway. The

appellant took the Broadway "L" and Mrs. Schacht went into a Woolworth store by way of the Broadway entrance, made no purchases and left through the Marcy Avenue door. She then went to No. 79 Morton Street, Brooklyn, stayed about a minute and entered a three-family and basement brick house at No. 71 Morton Street, where she stayed for about forty minutes (829-831). Mrs. Schacht did some shopping and proceeded to her home, which she reached about 2 P. M. (832).

Further Testimony.

On January 13, 1939, the appellant and a man named Bennie Friedman visited a jeweler, Louis Hopkins (412, 415, 417), with reference to a lavalliere (pendant) which the appellant offered to sell to Friedman. They consulted the jeweler about making a brooch out of it (419). The appellant drew a sketch of the brooch, which he showed to the jeweler (428). Hopkins refused to do the job (420), and no money passed from Friedman to the appellant (421).

About a week later (January 20, 1939), the appellant brought a diamond ring to the jeweler, Hopkins, and asked him to remount the stone, which at that time was in the lady's platinum setting (424-426). The jeweler suggested a man's yellow gold setting, with a white top (426).

The Arrest.

On February 9, 1939, at about 5 P. M., Charles Schacht and the appellant came out of a building on John Street, Manhattan, stood talking at the curb and then separated. Sergeant Giddings, with two other detectives, took the appellant to the district attorney's office in Brooklyn (807; 675). Charles Schacht was conducted to the district attorney's office by Detective Gilroy (398). While Bessie Schacht was being interrogated in the district attorney's

office the appellant was brought into the room. He shouted to Bessie Schacht (683), "Don't say anything. They have nothing on us. You will only get us in trouble. Keep quiet and they have nothing on us."

The sketch of the brooch (*People's Exhibit No. 19*) was found in the appellant's pocket (684), as was a check of Ben Friedman (*People's Exhibit 21*), which the appellant said represented a part payment for a brooch which he had sold to Friedman (804). The appellant said (801): "That is a legitimate check. Ben Friedman lives at the Lincoln Hotel." The brooch (*People's Exhibit No. 8*) was found later that evening when Friedman's room at the Hotel Lincoln was searched by Detective O'Connor (558-560). The brooch was identified by Louis Snyder as the pendant he had appraised for Charles Schacht (224), in October, 1938, and was identified by Louis Hopkins as the lavalliere which the appellant had brought to his shop on January 13, 1939 (417).

David Greenberg, identified as David Davis (667), the appellant's brother-in-law (563), had a safe deposit vault in the Corn Exchange Bank, Yorkville branch (578). The vault was opened on February 16, 1939 (571), and "a large diamond" was found in a "gent's yellow ring" (578). The diamond was identified by Louis Snyder (230), as the stone he had appraised for Charles Schacht in October, 1938, which at that time had been in a lady's setting (230). The stone was also identified by Louis Hopkins (423), as the diamond which had been in a lady's setting (425), and which the appellant on or about January 20, 1939 (424), wanted remounted. At that time, Hopkins had suggested a gent's yellow gold setting (426).

The Confessions.

Bessie Schacht, when questioned in the district attorney's office, on February 9, 1939 (874), identified her signature

on the proof of loss dated February 4, 1939 (877). She said that she never owned the platinum solitaire and the platinum pendant brooch combination which she claimed she had lost as a result of the burglary of her home between 12:30 P. M. and 2 P. M. on January 4, 1939 (880-881).

Mrs. Schacht explained that the appellant had brought the jewelry into her home a couple of months before and told her that he wanted to make a little money with it (915).

Mrs. Schacht said that on January 4, 1939, the appellant, Murray Shapiro, reached her home some time in the morning between 9 and 12 o'clock. Her husband was at home when the appellant arrived and was in the room when the appellant threw the linen on the bed (888-891). Mrs. Schacht "guessed" that the appellant had put the jimmy marks on the door (892-893). She said that she knew on January 4, 1939, when she notified the police of the burglary, that she was making a false claim and a false statement.

Schacht stated in the office of the district attorney that when Derene, the insurance broker, required an appraisal before the policy of insurance would be issued, the appellant brought the ring and pendant to Schacht (920-921). Schacht said he knew that the burglary was going to happen on January 4, 1939, and that the appellant was in his house when he left that morning (938). The arrangements were for Derene to be given ten per cent. of the money paid on the loss by the insurance company. The balance was to be divided between the appellant and Schacht (936). The appellant told Mrs. Schacht to telephone her husband around noon of January 4, 1939, and to notify the police of the burglary at 2 P. M. (939-940).

The Defense.

The defendants sought to prove that the brooch (*People's Exhibit No. 8*), which had been found in Ben Friedman's room and the ring (*People's Exhibit No. 9*) found in the safe deposit vault of the appellant's brother-in-law, were not the pieces of jewelry which had been stolen from their home on January 4, 1939. They claimed that the appellant was not at their home on January 4, 1939 (1038). Jack Schacht, son of Charles and Bessie Schacht, testified that although his mother and father had a large stone and brooch for a number of years, they were not the ring and brooch shown to him in court (1037).

Charles Schacht, testified that he never owned the ring and brooch (*People's Exhibits Nos. 8 and 9*), and had never had them in his possession, but that he did own a ring and brooch which he had had insured (1062). He said that he had bought the ring in 1928 from Julius Farber, a jeweler at 15 West 27th Street and had bought the brooch in 1921 from Mr. Halpern, a jewelry salesman. Mr. Schacht testified that he had had his jewelry appraised by Mr. Snyder and insured by Mr. Derene, as broker, but that the jewelry appraised and insured was not the jewelry shown to him in court (1063-1065).

Argument.

1. The petitioner maintains that the introduction in evidence of the statements of Mrs. Schacht and her husband, Charles Schacht, was prejudicial to him, and for that reason his conviction was the result of a trial that was unfair. He seeks a writ of certiorari on the ground that having for that alleged reason been deprived of a fair trial, the due process clause of the Fourteenth Amendment of the United States Constitution was violated.

The argument advanced by the petitioner is without substance, because the prosecution adduced testimony which, independent of the statements of the co-defendants, showed that the petitioner conspired to, and did commit the crimes with which he was charged and of which he was convicted.

The petitioner's brief in support of his petition leaves the impression that the prosecution's testimony was limited to the statements of the co-defendants. The petitioner relies upon *People* v. *Feolo* (282 N. Y. 276).

There is clear and obvious distinction between the case at bar and the *Feolo* case. There, in advance of the trial, a motion for a severance (New York Code of Criminal Procedure, section 391) was made as to Feolo, and denied by the trial court. No such motion was made herein. The court did not depart, in the *Feolo* case, from the previous rule that when defendants are jointly indicted, even though the subject of confessions is involved, the question whether there should be separate trials is one addressed primarily to the discretion of the court. The court had previously held (*People* v. *Fisher*, 249 N. Y. 419, 427-428):

> "In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed. One who makes no confession must be found guilty, if at all, only on proof independent of a confession by a co-defendant."

The present record is replete with "proof independent of a confession by a co-defendant", to wit:

> 1. The jewelry was appraised at Schacht's request (223-224), and then was insured. The simulated burglary had taken place and the loss had been reported

to the police, as well as to the insurance company, through the broker, Derene. Everything as planned had been consummated except to collect the insurance. Before that could be accomplished a proof of loss had to be executed by the assured, who, with her husband, met Derene in a restaurant to sign the necessary form. By a strange coincidence, the petitioner was not only in the restaurant when Derene met the Schachts, but he was at the very next table (189, 192). There can be no question about Derene's recognizing the petitioner because they had known each other for eight or nine years (199).

2. The special agents of the National Board of Fire Underwriters at 12:40 P. M. (828, 978), on January 4, 1939, the day of the alleged burglary, had observed the petitioner and Mrs. Schacht leave the Schacht apartment house.

3. On January 13, 1939, nine days after the jewelry was reported stolen, the petitioner brought the brooch to Hopkins, a jeweler. With the petitioner was Friedman, to whom the petitioner wanted to sell the brooch (419). Hopkins identified the brooch (*People's Exhibit No. 8*), which had been recovered from Friedman (560), as the same piece of jewelry which the petitioner had sought to sell to Friedman, on January 13, 1939.

4. When the petitioner was taken into custody, on February 9, 1939, he had on his person a check of Friedman (*People's Exhibit No. 21*). The petitioner himself told the police that the check represented part payment on a "pendant" which he had sold to Friedman (806).

5. The petitioner further stated (801): "That is a legitimate check * * *." He voluntarily added: "Ben Friedman lives at the Lincoln Hotel."

When the police went to Friedman's room immediately thereafter, they found the brooch (*People's Exhibit No. 8*).

6. About a week after January 13, 1939, the petitioner brought a diamond ring to the jeweler, Hopkins. The stone was then mounted in a lady's platinum setting and the petitioner sought Hopkins' advice about remounting it. The jeweler suggested a man's yellow gold setting with a white top. Hopkins identified the diamond (*People's Exhibit No. 9*), recovered from the safe deposit vault of the petitioner's brother-in-law, as the stone which the petitioner had had on January 20, 1939. It was in a man's yellow gold setting (578) when found.

7. The police, in pursuing the investigation, visited the petitioner's wife, as well as his sister and brother-in-law. The latter had a safe deposit box in the Yorkville Branch of the Corn Exchange Bank, under the assumed name of David Greenberg. The box was rented by the petitioner's brother-in-law on February 11, 1939 (658), the day after the petitioner was arrested (695).

8. In the box was found a diamond in a "gent's yellow ring" (578). It was this diamond that was identified by both jewelers, Hopkins and Snyder.

In spite of this testimony adduced by the people, "independent of the confession by a co-defendant", the petitioner seeks to bring himself within *People* v. *Feolo* (282 N. Y. 276, 281).

The case of *People* v. *Fisher* (249 N. Y. 419) is ill-cited by the petitioner. "Cast out the confessions", as to the petitioner, as the court did in the *Fisher* case, and the petitioner's conviction, nevertheless, must be sustained.

That the petitioner did not seek a separate trial obviates the necessity of considering the question further in so far as the petitioner relies upon the *Feolo* case. The law of New York is very definite on this point (*People* v. *Fisher*, 249 N. Y. 419, 424):

> "The mere existence of confessions and the probability of their introduction in evidence do not necessarily require separate trials. (*People* v. *Doran*, 246 N. Y. 409.) The proposition is, of course, elementary that the discretion must not be arbitrary and that its exercise is subject to review by a court having jurisdiction to pass upon facts. The test is whether a separate trial will assist or impede the proper administration of justice and secure to the accused the right of a fair trial. The question always presented by such a motion is whether a jury can properly weigh the testimony upon the various issues which may arise. 'The decision of the trial court rendered before the trial is dictated by a reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon determination of whether the prophesy has been realized.' (*People* v. *Snyder*, 246 N. Y. 491, 497.)"

The question of discretion is not involved as it was involved and was held to be decisive in that case. The petitioner clearly falls, therefore, within the *Fisher* case.

2. The petitioner maintains that the trial court failed to instruct the jury that the statements of the co-defendants should not be considered in determining the guilt of the petitioner.

Immediately before the statements were read into the record, over the objection of the petitioner's attorney, the trial court instructed the jury as follows (870-872):

> "Mr. Foreman, ladies and gentlemen of the jury. The Court is about to announce a ruling. The Dis-

> trict Attorney has had the witness on the stand to identify notes which the witness swore had been transribed by him, of statements made by two of the defendants in this case. The Court is about to allow these statements to be read to you. And it is of extreme importance that you understand and listen carefully as the statements are read, as to how you are permitted to take them. As to the defendant making each statement you may accept that as against that defendant, giving it whatever importance you think it deserves; but as to the names of others—of the one or two other defendants in the case, are mentioned in either statement; you are not to consider that whatever is said about the other defendant or the other two defendants can be considered by you as against the other defendant. I think that is clear. Under the circumstances and with this announcement, the objection is overruled with exceptions to the defendants."

Despite this instruction, the petitioner contends that the court failed adequately to inform the jury that it should not allow the statements to influence its verdict with respect to the petitioner (Petitioner's Brief, p. 43). He complains that the language was not clear; that the instruction (although delivered immediately before the statements were read) was forthcoming two days before the case was submitted to the jury; and that in its charge (1233-1283), the court did not repeat the instructions referred to. However, it granted the petitioner's request to charge (1293):

> "* * * any alleged confession made by a particular defendant and not in the presence of the other is not binding on that person * * * after the conspiracy had been completed."

The petitioner attempts to minimize the effect of this, the trial court's final instruction, pursuant to request. The petitioner on the one hand complains that the trial court's

formal charge did not embrace instructions concerning the inapplicability of the co-defendants' statements to the guilt of the petitioner. Realizing, however, that the granting of his request to charge emasculates his complaint, he indulges in the sophistry that such charge as requested merely confused the jury (Petitioner's Brief, p. 49). It was stated (*State* v. *Fox*, 133 Ohio State 154, 160):

> "A presumption always exists that the jury has followed the instructions of the court as to the law. *Browning* v. *State*, 120 Ohio St. 62, 72."

It is to be presumed that a jury, as reasonable persons, is possessed of such a fair amount of good sense and judgment as to be able to understand and apply the instructions of the court (*People* v. *Smith*, 180 N. Y. 125, 134; *People* v. *Rimeri*, 180 N. Y. 163, 167, 168).

The trial court carefully and fully instructed the jury that a statement by one defendant may be accepted only as against that defendant, and that any statement concerning a co-defendant could not be considered as against that co-defendant. Whether such instruction was forthcoming in the body of the formal charge or was enunciated immediately thereafter is of no moment. The fact is that the jury was properly advised in the premises and the rights of the petitioner were fully protected.

The language of the court in *State* v. *Fox* (133 Ohio State 154, 160) is pertinent:

> "So, most of the courts speaking on the subject have held that when two or more persons are jointly indicted and tried, the voluntary admissions and confessions as to the offense charged, by one of them, are admissible against him as made, though they may implicate a co-defendant who was not present when they were given. On objection thereto, by the co-defendant affected, or if he requests it, the court

> must instruct the jury specifically that such admissions and confessions can be considered only as against the one making them and not against the co-defendant."

The court cited in support: *Pappas* v. *U. S.*, 292 Fed. 982; *Randazzo* v. *U. S.*, 300 Fed. 794; *U. S.* v. *Newhoff*, 83 Fed. (2nd) 942 (cert. denied 299 U. S. 565).

3. The petitioner has only inferentially suggested that the statements of his co-defendants were involuntary. *Brown* v. *Mississippi* (297 U. S. 278) cited by the petitioner (Brief, pp. 23, 28, 53) is not analogous to the instant case since the confession involved therein was obtained by torture. In *Chambers* v. *Florida* (309 U. S. 227), also cited by the petitioner (Brief, pp. 23, 28) it was held that this court is not bound by the jury's finding that the confessions were voluntary. The question of the voluntariness of the confessions herein is not sought to be reviewed.

The cases cited by the petitioner are not probative of the question raised herein. That the judge has a pecuniary interest in the outcome of a trial (*Tumey* v. *Ohio*, 273 U. S. 510) or that a state statute holds that if a bank fails, the directors will be presumed to have indulged in fraud (*Manley* v. *Georgia*, 279 U. S. 1), or that the conviction is based upon testimony that did not prove an essential element of the crime (*Fiske* v. *Kansas*, 274 U. S. 380), or that there is discrimination in the preparation of jury panels from which the trial jurors were drawn (*Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354), or that there is a denial of an opportunity to secure counsel and prepare for trial (*Powell* v. *Alabama*, 287 U. S. 45), or that the conviction is based upon perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103), or that a state levies a tax on newspapers which interferes with the right

of freedom of the press (*Grosjean* v. *American Press*, 297 U. S. 233), does not support the claim that under the circumstances herein the admission in evidence of the statements of the petitioner's co-defendants was improper and in and of itself violated the due process clause.

The petitioner's entire argument assumes that his conviction was based only upon the aforementioned statements of his co-defendants and entirely disregards the clear, concise and forceful testimony "which proved his guilt independent of such statements".

Conclusion.

The decisions of the courts below were correct. The petitioner received a fair and impartial trial and all of his rights were fully protected. We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, Brooklyn, N. Y., May, 1941.

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